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International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2273/2013*, **

Communication submitted by:	Andrea Vandom (represented by Benjamin K. Wagner)
Alleged victim:	The author
State party:	Republic of Korea
Date of communication:	7 July 2013 (initial submission)
Document references:	Decision taken pursuant to rule 97 of the Committee's rules of procedure, transmitted to the State party on 18 July 2013 (not issued in document form)
Date of adoption of Views:	12 July 2018
Subject matter:	Mandatory HIV and drug testing for visa extension
Procedural issues:	Exhaustion of domestic remedies; level of substantiation of claims; abuse of right of submission
Substantive issues:	Right to an effective remedy; equality before the law; right to privacy; discrimination on the ground of nationality and race
Articles of the Covenant:	2; 14 (1); 17 and 26
Articles of the Optional Protocol:	2, 3 and 5 (2) (b)

1. The author of the communication is Andrea Vandom, a national of the United States of America born on 8 September 1978. She claims that the Republic of Korea has violated her rights under articles 2, 14 (1), 17 and 26 of the Covenant. The Optional Protocol entered into force for the State party on 10 July 1990. The author is represented by counsel.

* Adopted by the Committee at its 123th session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania Maria Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Marcia Kran, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval.

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The facts as submitted by the author

2.1 In March 2006, the author was hired by a private university as an English teacher in the town of Anseong, Republic of Korea. She has a Master of Arts degree in education and is a licensed teacher in California. In the United States she taught children, but in the Republic of Korea she was teaching English as a foreign language to university students.

2.2 On 15 December 2007, the Ministry of Justice of the Republic of Korea implemented a policy requiring teachers who were not nationals of the State party and who were not of Korean ethnicity to submit to mandatory HIV and drug testing as a precondition for approval of their visa. Under the policy, a two-step verification process was set up. In the first step, foreign teachers applying for E-2 foreign language teaching visas from overseas were required to fill out a questionnaire called the "E-2 Applicant's Health Statement". According to immigration regulations, all foreigners had to complete an alien registration process within 90 days of entering the State party. At the time of registration, holders of E-2 visas were required to submit health certificates obtained from a hospital designated by the Government, stating that the bearer was drug-free and HIV/AIDS-negative. E-2 visa holders who successfully completed the alien registration process received identification cards, while those who failed the HIV and drug tests had their E-2 visas cancelled and were deported. The mandatory testing requirement also applied to E-2 visa holders already in the country who applied for extensions of their existing visas. The author argues that when the authorities began to use the new E-2 visa procedure in 2007 it was merely a "policy memo"[1] without legal status. She notes that the policy was not promulgated as an immigration regulation until 4 April 2009, when article 76 (1) of the Immigration Law Enforcement Regulation was amended. She refers to a similar case before the Constitutional Court in which the Court found that under constitutional law a National Assembly act was required to limit the right to equal treatment in the workplace where such rights were capable of limitation, and that a mere administrative regulation was not sufficient.[2] Before challenges raised as to whether the restrictions imposed under the policy could be implemented, the Ministry of Justice declared that the policy memo had sufficient legal authority, as it had been issued by the Ministry of Justice on behalf of the Government. As the E-2 visa measures were being introduced, some 20,000 foreign teachers, many of whom had lived and worked in the country for years, began undergoing mandatory in-country HIV and drug tests.

2.3 Teachers who were nationals of the Republic of Korea were exempt from the mandatory HIV and drug tests. Teachers of Korean ethnicity who were not nationals of the Republic of Korea were also exempt. Their Korean ethnicity entitled them to the legal status of "overseas Koreans", meaning that they were able to receive F-4 visas, for which there were no for mandatory HIV and drug tests.

2.4 The author argues that the intent of the State party in creating the E-2 visa policy was to reinforce negative beliefs about the moral character of non-ethnic-Korean teachers. Its effect was that foreign teachers started to be profiled in the news media as suspected criminals and to be singled out from among colleagues of Korean nationality or ethnicity. Statements by the Government confirmed that the tests were in place for wholly symbolic reasons and not because of public health concerns, fears of accidental transmission or public ignorance concerning the routes of infection.

2.5 On 27 February 2009, the author attempted to renew her E-2 visa at the Immigration Office in Suwon. An immigration officer gave the author a temporary 30-day stamp and informed her that in order to extend the visa, she had to return with a health certificate containing the results of in-country drug and HIV tests. On 25 March, the author presented a written statement explaining that she refused to undergo the drug and HIV testing because she found it to be discriminatory and a violation of her rights to privacy and personal dignity. The immigration officer read the author's statement and extended her visa for one year.

[1] In its observations on the admissibility and merits of the communication, the State party argues that the correct translation of this term is not "policy memo" but "guidelines" (see para. 4.1).

[2] Decision 2004-HunMa-670 of 20 August 2007.

2.6 On 30 and 31 March 2009, the immigration authorities informed the author by telephone and through the intermediary of her university employer that her visa had been extended in error and requested her to undergo the medical tests. She was also told that if she refused, she would face the cancellation of her visa, arrest and loss of employment. On 1 April, an immigration officer informed the author by telephone that in the light of her non-compliance with her obligation to undergo the compulsory test, her visa extension would be cancelled immediately.

2.7 By letters sent on 10 and 29 April 2009, the author was convoked by summons to appear before the Immigration Office in connection with a suspected violation of immigration law. On the advice of counsel, the author did not appear on either occasion. On 30 April, the Immigration Office sent a letter to the author's employer urging the authorities of the university to advise her "to submit her health check report, so that she may continue teaching". The university pressured the author to comply with the demand. She was told by university officials that her position at the university would be terminated if she did not submit the HIV and drug test results. When the author explained that she would not submit the test results even if it meant losing her job, university officials told her that by refusing to cooperate she was also endangering the positions of her foreign colleagues. University officials also began informing her foreign colleagues that by refusing to submit the test results the author was causing trouble that would affect them. Feeling pressured by the university to submit to the testing, the author tendered her resignation in mid-July and left the Republic of Korea on 31 July. Despite having exited the country through proper immigration channels, which involved surrendering her identification card, media reports quoting government officials described her as "being sought" by immigration authorities.

2.8 Before leaving the country, the author filed a petition against the State party before the Constitutional Court. The subject matter of the complaint was whether the summons to appear before the Immigration Office, the letter sent by the Immigration Office to the author's place of employment and the mandatory in-country HIV/AIDS and drug testing required under article 76 (1) of the Immigration Law Enforcement Regulation had violated her fundamental rights. On 29 September 2011, the Constitutional Court dismissed her petition. The Court found that the two requests made by the Chief of the Suwon Immigration Office in his letters had merely required the author to report to the Immigration Office, without mentioning anything about submitting HIV and drug testing examination documents; the Court noted that it could be assumed that a request to submit examination documents would be made at a later stage, but that the duty to submit the said documents was "imposed by a separate requirement and not by this request for her attendance". It further found that the letter sent to the author's university only requested the university to guide or advise her in making an appearance at the Immigration Office and, furthermore, that the recipient of the letter was not the author herself but her university. The Court concluded that the action of sending the letter had no legal effect that obligated the author to submit the documents and that, consequently, actions taken by the Immigration Office could not be seen as an intrusive exercise of the Government's authority over the author's fundamental rights. The Court further noted that article 76 (1) of the Immigration Law Enforcement Regulations stipulated that when issuing a visa an applicant's health statement must include the disclosure of HIV status and illegal drug use information. It found that as the author had already entered the country with an E-2 visa and was only requesting an extension of her stay, she was excluded from the purview of article 76 (1) and therefore lacked standing to challenge the regulation requiring mandatory HIV and drug test requirements. The Court also found that the author had "incorrectly designated the subject for judgment". It noted that she had submitted her request to extend her stay for a further year on 27 February 2009 at the Suwon Immigration Office. An immigration office official had provisionally accepted the request, but the Immigration Office later required her to supplement her documents with the health examination certificate by 30 March. The Court found that while it could, *sua sponte*, change the subject matter of the complaint so that the request for supplementary documentation could be considered, such an amended complaint would not meet the requirement of having to be filed within 90 days.

The complaint

3.1 The author claims that the State party violated her rights under articles 2, 14, 17 and 26 of the Covenant. She argues that protecting human rights is an essential part of preventing HIV/AIDS. She refers to reports and statements of the World Health Organization (WHO) stating that "no screening programme of international travellers can prevent the introduction and spread of HIV infection" [3] and that "there is no public health rationale for any measures that limit the rights of the individual, notably measures establishing mandatory screening". [4] The author also refers to the HIV and AIDS Recommendation, 2010 (No. 200) of the International Labour Organization (ILO) in which it is noted that "no workers should be required to undertake an HIV test or disclose their HIV status" and that "there should be no discrimination against or stigmatization of workers, in particular jobseekers and job applicants, on the grounds of real or perceived HIV status or the fact that they belong to regions of the world or segments of the population perceived to be at greater risk of or more vulnerable to HIV infection".

3.2 The author claims that the State party's mandatory in-country HIV testing policy violated her right to non-discriminatory treatment under articles 2 and 26 of the Covenant. She argues that this policy impermissibly discriminated against her on the basis of nationality and ethnicity and that the policy was discriminatory in intent, as it resulted from animus towards foreign teachers, had no legitimate purpose and could not be justified as reasonably necessary. Because the mandatory testing was only required of members of a perceived high-risk group, namely foreign teachers of non-Korean ethnicity, the author asserts that the testing policy was predicated on the presumption that she was HIV-positive. The author argues that the State party subjects persons actually living with HIV to discriminatory treatment such as exclusion from or loss of employment, visa cancellation and deportation from the country. She claims that she in fact suffered such consequences as a result of the mandatory HIV testing policy, which presumed her to be HIV-positive.

3.3 The author further claims that the mandatory HIV testing policy was an arbitrary and unreasonable interference with her right to privacy under article 17 of the Covenant. The author argues that the HIV testing policy and the State party's actions to enforce this policy violated her right to privacy because the policy required the author to disclose her HIV status to the State party; the State party attempted to force the author to undergo HIV testing on the basis of the issued policy memo prior to it being promulgated as an immigration regulation; the State party sent the author's employer a report on the author and pressured the employer to oblige her to undergo testing; the State party made telephone calls threatening the author with deportation and visa cancellation; and the State party made public statements naming the author and stating that she was being sought and that her visa was no longer valid.

3.4 The author also claims that the mandatory in-country drug testing policy and regulations violated her rights to non-discriminatory treatment and privacy under articles 2, 17 and 26 of the Covenant. She notes that in certain circumstances mandatory drug testing may be justified as an occupational requirement, such as drug tests for workers in safety-sensitive positions. She argues that teaching, however, is not generally viewed as a safety-sensitive position that would allow for mandatory drug testing. She further notes that teachers of Korean nationality or ethnicity were not subject to the policy. She refers to the ILO Code of Practice on the Management of Alcohol- and Drug-related Issues in the Workplace, in which it is stated that "alcohol and drug policies and programmes should apply to all staff, managers and employees and should not discriminate on grounds of race, colour, sex, religion, political opinion, national extraction or social origin". The author argues that the discriminatory application of the drug-testing policy is a violation of her rights under articles 2 and 26 of the Covenant. She further argues that as the drug testing constitutes a body search, it amounts to an unlawful and arbitrary interference of her rights under article 17 of the Covenant.

[3] WHO, Special Programme on AIDS, "Report of the Consultation on International Travel and HIV Infection, Geneva, 2–3 March 1987".

[4] Global strategy for the prevention and control of AIDS, World Health Assembly resolution WHA45.35, 1992.

3.5 The author also claims that by dismissing her petition without examining it on the merits, the Constitutional Court violated her rights under articles 2 (2) and (3), 14 and 26 of the Covenant. She further claims that her right under article 26 to equal and effective protection of the law was violated, as the Court refused to substantively examine her petition although it had substantively examined a similar petition filed by an ethnic Korean foreigner.[5] She argues that her argument is substantially similar to that made by the petitioner in that case, namely that she was treated discriminatorily in relation to the citizens of the State party, but also in relation to other non-citizens.

State party's observations on admissibility and the merits

4.1 In its observations on admissibility and the merits of the communication dated 23 April 2014, the State party submits that the author was unclear and vague as to the actions of the State party's authorities that she considered amounted to a violation of the Covenant. It further argues that the author has not specified relevant policies or regulations or specific actions or omissions of the State party that would amount to a violation of her rights under the Covenant, but has rather referred to media reports and statements by unidentified persons. The State party further submits that, according to the author, she was "summoned" to appear before the Immigration Office, but that the correct translation should be "requested" to appear. It considers that the use of the word "summons" in the complaint mistakenly conjures a sense of compulsory legal effect in cases of non-compliance. The State party therefore considers that the author has abused the right of submission of the communication as she has failed to substantiate her allegations.

4.2 The State party also submits that the communication is inadmissible for failure to exhaust domestic remedies pursuant to article 5 (2) (b) of the Optional Protocol. It notes the author's argument that the guidelines issued by the Ministry of Justice in 2007 had the legal effect of limiting her rights. The State party submits that the guidelines were, in principle, merely internal guidelines which had no legal effect to limit rights of individuals. It argues that if the author considers that the guidelines were applied in her case and violated her rights, then she is entitled to submit a constitutional complaint in that regard. It also argues that the complaint the author submitted in 2009 was not a constitutional complaint against the guidelines of the Ministry of Justice but rather a constitutional complaint against the Immigration Office's request to appear and article 76 (1) of the Immigration Law Enforcement Regulation. It notes that the Constitutional Court dismissed her complaint as the request to appear did not entail an obligation to submit health check documents and was thus not an exercise of public power, and as the immigration regulation did not apply to the author as she was requesting an extension of stay.

4.3 As to the merits of the communication, the State party argues that international law recognizes a wide range of discretion of States in regulating the entry of non-nationals based on reasons such as criminal records, previous violations of immigration regulations, national security, public health, risks of illegal employment or economic concerns. It submits that the requirement of a submission of a health check document that includes HIV test results for certain non-nationals applying for a stay of more than 90 days falls under the legitimate aims of protecting public health and maintaining public order. This requirement is limited to applicants in a profession that involves a confined environment and contact with minors, such as E-2 visa applicants as well as E-6 (entertainment), E-10 (vessel crew), D-3 (industrial trainee), E-7 (teachers in foreign educational facilities) and E-9 (non-professional employment) visa applicants. As the requirement applies to all applicants for those visas, it is not discriminatory in nature.

4.4 The State party further submits that non-nationals, such as the author, who were already in the country with a valid visa were not under a mandatory requirement to submit

[5] The author refers to decision 99-Hun-ma-494 of 12 November 2001 of the Constitutional Court, in which a Chinese petitioner claimed that as an ethnic Korean he was entitled to the same type of visa (F-4) as ethnic Koreans from States such as the United States, Canada and Japan but because he was from China, the Government had discriminatorily deprived him of such a visa. The Court found in favour of the petitioner, concluding that the Government had violated both his right to equality and his right to human dignity.

HIV or drug tests but were merely encouraged to undertake voluntary consultation and examination. It argues that the author's assertion that she was discriminated against compared to non-national ethnic Koreans is incorrect as under the E-2 visa procedure, non-national ethnic Koreans were subject to the same testing requirement. It notes that the F-4 visa is granted by virtue of the historical legacy of the Korean peninsula and is extended to persons who used to have Korean nationality or whose parents or grandparents were Korean nationals. It submits that this difference in treatment is based on objective and reasonable grounds.

4.5 As concerns the author's claims under article 17, the State party submits that the request to submit health check documents was based on guidelines issued by the Ministry of Justice under the Immigration Control Act and that, accordingly, it cannot be regarded as an illegal request with no legal grounds. It also argues that the measure was imposed for an objective and just purpose, namely managing the entry and stay of foreigners in order to maintain public health and public order. Teachers, who educate and interact with children, should be subject to higher professional standards, which is why they are requested to submit health check documents not applicable to other categories of visa applicants. The tests are conducted with appropriate methods by testing urine and blood, and measures have been taken to prevent any disclosure of sensitive personal information. The requirement that E-2 visa applicants submit HIV and drug tests therefore satisfies the standards of necessity and proportionality and does not amount to a violation of article 17 of the Covenant.

4.6 The State party further notes the author's claim that by dismissing her petition, the Constitutional Court violated her rights under articles 2, 14 and 26 of the Covenant. It argues that in order to substantiate her claim of discrimination in the right to a fair trial, the author must demonstrate that the Court denied her the right to equality before the law, or that she was disadvantaged in the legal proceedings due to her status as a non-national. The State party argues that the Court acknowledged the author's entitlement to fundamental rights and examined her complaint. It notes that the Court considered the possibility to rectify *suo moto* the author's inadmissible claims but that this could not be done as the complaint had not been filed within the 90-day deadline.

4.7 The State party also provides information on changes to the legislation on immigration. It notes that the Ministry of Justice has issued amended guidelines on a non-national's entry and stay, namely the partial amendment to E-2 visa issuance and stay management guidelines of 2010. Under these guidelines, officials shall not deny a visa, declare null the permission to stay or order deportation for the sole reason of HIV/AIDS infection and the decision on whether to permit entry or extend stay is determined on an individual basis, taking into account the circumstances of the case. The State party submits that these changes should be taken into account in reviewing the communication.

Authors' comments on the State party's observations on admissibility and the merits

5.1 On 14 January 2015, the author submitted her comments on the State party's observations. She maintains that the communication is admissible and that she has clearly identified the actions and inactions of the State party which gave rise to violations of the Covenant. She refers to her submission of 7 July 2013 and notes that the Ministry of Justice policy memo of 2007 contained a document titled "E-2 applicant's health statement", and argues that this document triggered the mandatory in-country HIV and drug testing requirements. She further refers to a document published by the Ministry of Justice in English on 10 December 2007 titled "New changes on the E-2 teaching visa holders in Korea" in which it is stated that "those E-2 teaching visa holders who are already in Korea need to submit their health certificate when applying for the extension of their residence in Korea. Those who are newly applying for an E-2 teaching visa need to submit their health certificate when applying for alien registration to the Immigration Office in Korea".

5.2 As concerns the State party's argument regarding the documents sent to her by the Immigration Office on 10 and 29 April 2009, the author notes that the translation of the document was not done by her but by the Immigration Office itself; as such, it was the Immigration Office that had labelled the document "a summon".

5.3 The author maintains that she has exhausted all available domestic remedies. She notes the State party's argument that the communication should be held inadmissible as her constitutional complaint was brought against the immigration regulations and not the policy memo. She considers that this assertion is inaccurate because her claim before the Constitutional Court was that, prior to the enactment in the immigration regulations of the mandatory testing requirement, the demands that she submit health certificates were made under a policy memo whereas, after the enactment, the demands were made under the immigration regulations. She further argues that the State party has failed to show how a complaint brought against the policy memo could have had any reasonable chance of success as the language of the memo was identical to that in the immigration regulation.

5.4 Regarding the State party's observations on the merits, the author refers to and reiterates her submission of 7 July 2013. As concerns the State party's argument that the medical information of E-2 visa holders is managed so as to prevent disclosure of sensitive information, the author notes that no information has been provided by the State party as to how such data are processed, stored and transferred or whether required protections are in place.

6.1 In a further submission dated 21 September 2016, the author noted that in a 2016 submission for the fourth periodic report of the State party to the Committee, the National Human Rights Commission of the Republic of Korea had confirmed that mandatory HIV testing was still required of E-2 visa holders.[6] She further notes the decision of the Committee on the Elimination of Racial Discrimination in *L.G. v. Republic of Korea* (CERD/C/86/D/51/2012), where the Committee found that the Government's practice of exempting persons of Korean nationality or ethnicity from the HIV/AIDS and drug testing requirement while subjecting foreign instructors to mandatory testing amounted to racial discrimination.

6.2 On 1 December 2016, the author submitted a brief by the Secretariat of the Joint United Nations Programme on HIV/AIDS (UNAIDS) in which it expressed the view that blanket deportation of foreign nationals living with HIV and other forms of HIV-related restrictions on the entry, stay and residence of people living with HIV is contrary to international human rights obligations; that evidence from various regions of the world shows that mandatory and other coercive forms of HIV testing targeting specific population groups as well as blanket deportation of HIV-positive individuals are harmful for the response to HIV; and that voluntary HIV testing and counselling, together with access to prevention, treatment, care and support for all individuals, including non-nationals, is the most effective approach to promote public health in the context of mobility.

6.3 The UNAIDS Secretariat notes that mandatory HIV testing refers to testing that is conducted on a person without their informed consent and that, according to WHO and UNAIDS, the only acceptable forms of testing without informed consent are those that do not involve the direct testing of individuals.[7] It notes that United Nations treaty bodies have recognized that health status, including real or perceived HIV status, is a prohibited ground of discrimination under international law[8] and that in the context of international movement of persons, the International Task Team on HIV-related Travel Restrictions has found that "restrictions on entry, stay and residence based on HIV status alone amount to differential

[6] Independent report of the National Human Rights Commission of Korea for consideration of the fourth periodic report of the State party to the Human Rights Committee, section 8, issue 19-1, p. 19.

[7] WHO, "Statement on HIV testing and counseling: WHO, UNAIDS reaffirm opposition to mandatory HIV testing", 28 November 2012, available at www.who.int/hiv/events/2012/world_aids_day/hiv_testing_counselling/en/.

[8] Reference is made to the Committee's general comment No. 18 (1989) on non-discrimination, paras. 7 and 13; Committee on Economic, Social and Cultural Rights, general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 33; and general comment No. 22 (2016) on the right to sexual and reproductive health, para. 30; *L.G. v. Republic of Korea*; Committee on the Elimination of Discrimination against Women, concluding observations on the initial report of Qatar (CEDAW/C/QAT/CO/1), para. 40 (b); and Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, concluding observations on the second periodic report of the Philippines (CMW/C/PHL/CO/2), para. 11.

and discriminatory treatment of HIV-positive people and inequality before the law".[9] The submission further highlights that it has long been recognized that HIV cannot be spread by airborne particles or by casual contact. The routes of HIV transmission are very specific and involve unprotected sexual intercourse with an HIV-positive person; injection with HIV-contaminated needles, syringes, blood or blood products; and from an HIV-positive mother to her fetus in utero through intrapartum inoculation from mother to infant or during breastfeeding. As a result, HIV does not fall into the category of health conditions for which limitation of movements under the International Health Regulations are applicable.[10] It also notes that more than 30 years of experience on HIV from all regions of the world have shown that mandatory HIV testing and other forms of coercive HIV testing have direct and negative impacts on the response to HIV.[11] Mandatory HIV testing often targets vulnerable and marginalized populations, including migrants, and there is no evidence that it advances public health objectives. On the contrary, several studies and experts have highlighted the negative public health impact of this practice.[12] The UNAIDS Secretariat further notes that a serious concern associated with mandatory HIV testing for foreign nationals is that it perpetuates misconceptions that HIV is mainly transmitted by foreign nationals and that the imposition of restrictions to the entry, stay and residence for HIV-positive migrants is necessary and sufficient to address the epidemic. The UNAIDS Secretariat considers that mandatory HIV testing, including of foreign nationals, infringes upon human rights, undermines the effectiveness of HIV programmes and may create a false sense of security among nationals that is detrimental to HIV prevention efforts. It stresses that the protection of human rights, including the rights to autonomy and informed consent in the context of HIV services and programmes, is essential to effective responses and that countries should therefore rely on voluntary, non-discriminatory and rights-based approaches to HIV, including in the context of HIV testing.

6.4 In her submission of 1 December 2016, the author further noted that following the decision of the Committee on the Elimination of Racial Discrimination in *L.G v. Republic of Korea*, on 8 September 2016 the National Human Rights Commission of the Republic of Korea issued a decision on the mandatory HIV testing of E-2 visa holders. The Commission confirmed that Korean teachers and ethnic Korean foreign language teachers were exempt from mandatory HIV testing while foreign E-2 visa holders were obliged to undergo such testing. The Commission found that the mandatory test practice constituted racial discrimination under article 11 of the Constitution and article 26 of the Covenant and that it could constitute a discriminatory act based on medical history.

6.5 In a further submission of 26 July 2017, the author reported that on 8 July 2017, the Ministry of Justice of the Republic of Korea announced that the mandatory HIV test requirement for E-2 visa holders had been eliminated. She notes, however, that the mandatory in-country drug testing requirement has been maintained.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether it is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's submission that the communication should be held inadmissible for failure to exhaust domestic remedies pursuant to article 5 (2) (b) of

[9] UNAIDS, *Report of the International Task Team on HIV-related Travel Restrictions: Finding and Recommendations, December 2008*, para. 45.

[10] WHO, *International Health Regulations (2005), Third Edition*.

[11] UNAIDS and Office of the United Nations High Commissioner for Human Rights, *International Guidelines on HIV/AIDS and Human Rights, 2006 Consolidated Version* (2006), para. 96.

[12] UNAIDS, *Report of the International Task Team*, para. 35.

the Optional Protocol. The Committee recalls its jurisprudence to the effect that authors must avail themselves of all domestic remedies in order to fulfil the requirement of article 5 (2) (b), insofar as such remedies appear to be effective in the given case and are de facto available to the author. It notes the State party's argument that the author could have submitted a constitutional complaint before the Constitutional Court against the guidelines/policy memo issued by the Ministry of Justice in 2007. The Committee notes that prior to leaving the State party, the author submitted a complaint before the Constitutional Court which was dismissed on 29 September 2011, the subject matter of which was noted in the decision of the Court as being whether the requests to appear before the Immigration Office, the letter sent by the Immigration Office to the author's place of employment and the mandatory in-country HIV and drug testing under article 76 (1) of the Immigration Law Enforcement Regulation amounted to a violation of her rights to privacy, equality and human dignity. Taking into account the fact that the author has challenged the mandatory testing requirement under article 76 (1) of the Immigration Law Enforcement Regulation before the Constitutional Court, as well as her unrefuted argument that the language of the policy memo was identical to that of the challenged immigration regulation, the Committee considers that it is not precluded by article 5 (2) (b) of the Optional Protocol from examining the complaint.

7.4 The Committee further notes the State party's argument that the communication constitutes "an abuse of the right to submission" as the author has not specified the specific actions or omissions of the State party that would amount to a violation of her rights and as she allegedly did not correctly translate the documents sent to her by the Immigration Office on 10 and 29 April 2009. In this connection, the State party submits that these documents should be translated as "requests to appear" and not "a summon". The Committee notes, however, that the documents in question were drafted in both Korean and English and that the English version of the documents is labelled a "summon". As concerns the State party's submission that the author did not sufficiently substantiate her claims, the Committee notes her arguments that the HIV and drug testing policy violated her right to non-discriminatory treatment and right to privacy and led to her loss of employment and having to leave the State party. In view thereof, the Committee considers that the author has sufficiently substantiated her claims under article 17 and article 26, read alone and in conjunction with article 2 (1), for the purposes of admissibility.

7.5 The Committee further notes the author's claims that by dismissing her petition without examining it on the merits, the Constitutional Court violated her rights under articles 2 (2) and (3), 14 and 26 of the Covenant. The Committee notes, however, that the author has not provided any information that would enable it to conclude that she was denied a fair trial, denied the right to equality before the Court or disadvantaged in the proceedings on the basis of nationality or ethnicity. Accordingly, the Committee declares this part of the communication inadmissible under article 2 of the Optional Protocol.

7.6 In the absence of any other challenges to the admissibility of the communication, the Committee declares the communication admissible insofar as it concerns the author's claims under article 17 and article 26, read alone and in conjunction with article 2 (1), of the Covenant, and proceeds with its consideration on the merits.

Consideration of the merits

8.1 The Committee has considered the communication in the light of all the information made available to it by the parties, as provided for under article 5 (1) of the Optional Protocol.

8.2 The Committee notes the author's claim that the State party's mandatory in-country HIV and drug testing policy violated her right to non-discriminatory treatment under articles 2 (1) and 26 of the Covenant, as well as her right to privacy under article 17. It further notes her argument that the policy had no legitimate purpose and could not be justified as reasonably necessary. The Committee notes the State party's argument that the guidelines/policy memo were mere internal guidelines which had no legal effects to limit rights of individuals and that non-nationals who were already in the country with a valid visa, like the author, were not under a mandatory requirement to submit HIV or drug tests but were merely encouraged to undergo voluntary consultation and examination. It notes

the author's assertion that when she requested an extension of her visa on 27 February 2009, she was informed that she had to submit a health certificate containing the results of in-country drug and HIV tests; that on 30 and 31 March she was informed by the immigration authorities that her visa had been extended in error and that she had to submit the in-country drug and HIV tests; and that on 1 April, she was informed by an immigration officer that in the light of her non-compliance, her visa extension would be immediately cancelled. The Committee further notes that these requests were communicated to the author prior to the enactment of the visa policy in the immigration regulations on 4 April 2009.

8.3 The Committee also notes that the statement published by the Ministry of Justice on 10 December 2007 titled "New changes on the E2 teaching visa holders in Korea" stated that E-2 visa holders who were already in the Republic of Korea had to submit a health certificate when applying for the extension of their residence in the State party and that said certificates had to include a test for tuberculosis and cannabinoid use and an HIV test. The Committee also notes the decision of 8 September 2016 of the National Human Rights Commission of the Republic of Korea according to which foreign E-2 visa holders were under an obligation to undergo mandatory in-country testing. The Committee further notes that the documents sent to the author requesting her to appear at the Immigration Office were sent on 10 and 29 April 2009 and that the letters sent by the Immigration Office to her employer asking it to guide the author to submit a health certificate was sent on 30 April, at which point the mandatory HIV and drug test policy had been enacted through amendments to the Immigration Law Enforcement Regulation. The Committee further notes that in its decision of 29 September 2011, the Constitutional Court found that "[i]f the plaintiff had appeared at the Immigration Office, it can be expected that the defendant would have made a separate request at the time of appearance to submit the health examination certificate". The Committee therefore concludes, on the basis of the information on file, that under the policy memo issued by the State party in December 2007 as well as under the Immigration Law Enforcement Regulation of 4 April 2009, the author was subject to mandatory HIV and drug testing in order to have her application for a visa extension approved.

8.4 The Committee further notes the State party's argument that States enjoy discretion in regulating the entry of non-nationals and its argument that its policy requiring E-2 visa applicants to submit health check documents, which included HIV and drug test results, fell under the legitimate aims of protecting public health and maintaining public order. The Committee recalls that it is in principle a matter for a State party to decide whom it will admit to its territory. It recalls, however, that in certain circumstances a non-national may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.[13] The Committee further recalls that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.[14] In the present case the Committee notes that the mandatory HIV and drug testing policy applied to E-2 visa applicants and holders such as the author, namely non-national language instructors. However, the policy did not apply to teachers of Korean nationality or ethnicity in a similar position to the author's. Under the policy, a distinction was thus made based on nationality and ethnicity, which directly affected the author as an E-2 visa holder.

8.5 In this connection, the Committee recalls its jurisprudence that not all differentiations in treatment can be deemed to be discriminatory under article 26 and that a differentiation which is compatible with the provisions of the Covenant and is based on objective and reasonable grounds does not amount to prohibited discrimination within the meaning of article 26.[15] It notes the State party's argument that the policy was introduced as

[13] See general comment No. 15 (1986) on the position of aliens under the Covenant, para. 5.

[14] See general comment No. 18, para. 7.

[15] See *Zwaan-de Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 13; *Victor Drda v. Czech Republic* (CCPR/C/100/D/1581/2007), para. 7.2; *S.W.M. Broeks v. Netherlands*

a measure to protect public health and maintain public order. However, the Committee also notes that the State party has not provided any justification as to the reason why the imposition of the mandatory HIV/AIDS and drug testing policy on the specific group of foreign language instructors of non-Korean ethnicity but not on others in a similar position would have been in the furtherance of protecting public health and maintaining public order. The Committee further notes that the International Task Team on HIV-related Travel Restrictions has found that no State that has enacted HIV-related travel restrictions had been able to demonstrate that they are justified and rational.[16] The Committee further notes that the International Guidelines on HIV/AIDS and Human Rights provide that "it is evident that coercive public health measures drive away the people most in need of such services and fail to achieve their public health goals of prevention through behavioural change, care and health support" (para. 96). The Committee also notes the view expressed by the UNAIDS Secretariat in the author's submission of 1 December 2016 that mandatory and other coercive forms of HIV testing targeting specific population groups and blanket deportation of HIV-positive individuals are harmful for the response to HIV and that voluntary HIV testing and counselling, together with access to prevention, treatment, care and support for all individuals, including non-nationals, are the most effective approach to promote public health in the context of mobility. The Committee also notes the views of the Committee on the Elimination of Racial Discrimination in *L.G v. Republic of Korea* in which that Committee found that the mandatory testing policy amounted to a violation of the right to work without distinction as to race, colour, national or ethnic origin, in violation of the State party's obligation under the International Convention on the Elimination of All Forms of Racial Discrimination (para. 7.4). In the light of these circumstances the Committee finds that the State party has not demonstrated that the mandatory HIV/AIDS and drug testing policy for E-2 visa holders and applicants was based on objective and reasonable grounds or in the interest of public health or public order. The Committee therefore concludes that requiring the author to submit a mandatory HIV/AIDS and drug test certificate in connection with her application for a visa extension amounted to a violation of her rights under article 26 of the Covenant.

8.6 The Committee further notes the author's claims that the mandatory HIV and drug testing policy amounted to an arbitrary and unreasonable interference with her right to privacy under article 17 of the Covenant. In this connection, it notes the author's argument that the tests violated her right to privacy because it required her to disclose her HIV status to the State party; the State party authorities pressured her to undergo such testing and threatened her with cancellation of her visa if she did not comply; and the tests constituted a body search. The Committee also takes note of the view of WHO and UNAIDS that mandatory HIV testing refers to testing that is conducted on a person without their informed consent and that the only acceptable forms of such testing are those that do not involve the direct testing of individuals. In view thereof, the Committee considers that the compulsory HIV and drug test for the purpose of enabling the renewal of a visa for foreign teachers is sufficiently intrusive as to constitute an "interference" with the author's privacy under article 17 of the Covenant. The issue that arises is whether such interference was arbitrary or unlawful under article 17 of the Covenant.

8.7 The Committee recalls its general comment No. 16 (1988) on the right to privacy, in which it defines "unlawful" as meaning "that no interference can take place except in cases envisaged by law". The Committee notes that the author was first requested to take HIV and drug testing as a mandatory condition for the renewal of her work visa in February 2009, two months before the implementation of the amendments introduced to the Immigration Law Enforcement Regulation in April. The Committee further notes that in its observations the State party refers to the policy memo/guidelines of 2007 as "mere internal guidelines which had no legal effects". The Committee therefore concludes that the interference in the author's right to privacy was not envisaged by law at the time the policy was introduced in 2007. Nonetheless, following the enactment of the policy through

(CCPR/C/29/D/172/1984), para. 13; and *L.G. Danning v. Netherlands* (CCPR/C/29/D/180/1984), paras. 13 and 14.

[16] UNAIDS, *Report of the International Task Team*, para. 45.

amendments to the Immigration Law Enforcement Regulation in April 2009, the mandatory HIV and drug test became lawful under domestic law.

8.8 The Committee further recalls that the law itself "must comply with the provisions, aims and objectives of the Covenant, and should be, in any event, reasonable in the particular circumstances". [17] Accordingly, any interference with privacy and family must be proportionate to the legitimate end sought and necessary in the circumstances of any given case.[18]

8.9 In the present case, the Committee notes the State party's argument that the policy was "imposed for an objective and just purpose", namely managing the entry and stay of foreigners in order to maintain public health and public order; that the tests were conducted with appropriate methods through a urine and blood test and measures had been taken to prevent any disclosure of sensitive personal information, and that the test therefore satisfied the standards of necessity and proportionality. In this regard, the Committee takes note of the finding of the International Task Team that no evidence demonstrates that HIV restrictions on entry, stay and residence based on positive HIV status alone serve to protect the public health, but rather that such restrictions may harm public health. Additionally, the Committee observes that the State party has not provided any explanation of how the imposition of the mandatory HIV/AIDS and drug testing policy on the specific group of E-2 visa holders and applicants would have been in furtherance of protecting public health and maintaining public order or could otherwise be justified as reasonable in the circumstances of the case, especially considering the fact that teachers of Korean ethnicity and nationality were exempt from the policy. The Committee therefore concludes that the mandatory HIV/AIDS and drug testing policy amounted to a violation of the author's rights under article 17 of the Covenant.

9. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose a violation by the State party of the author's rights under articles 17 and 26 of the Covenant.

10. In accordance with article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obligated to, inter alia, provide the author with adequate compensation. Additionally, the State party is under the obligation to take steps to avoid similar violations in the future, including reviewing its legislation to ensure that it is in compliance with the Covenant, and that mandatory and other coercive forms of HIV/AIDS and drug testing is abolished and, if already abolished, not reintroduced.

11. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and disseminate them broadly in the official language of the State party.

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[17] See general comment No. 16, para. 4.

[18] See *Toonen v. Australia* (CCPR/C/50/D/488/1992), para. 8.3.